Supreme Court, U.S.
FILED
AUG 12 1994
OFFICE OF THE CLERK

NO. 94-94

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WOODSON CONSTRUCTION COMPANY
Petitioner,

v.

AMOCO PIPELINE COMPANY,
Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Pursuant to Rule 24.2, *Supreme Court Rules*, Respondent, Amoco Pipeline Company, disagrees with and does not adopt the Questions as stated by Petitioner, Woodson Construction Company. Rather, Amoco believes the Questions Presented should be worded as follows: Whether Petitioner was deprived of its right to procedural due process where (a) this case was tried on stipulated facts, and (b) the Court of Appeals reversed and remanded for entry of judgment against Petitioner, based in the alternative upon a fact finding which, although not a part of the stipulated facts before the trial court, was judicially admitted in Petitioner's pleadings before the appellate court and further was a fact upon which Petitioner specifically rejected an opportunity to have the appellate court remand the case for determination at the trial level.

CERTIFICATE OF INTERESTED PARTIES AND PARTIES BELOW

Respondent Amoco Pipeline Company adopts the Certificate of Interested Parties and Parties Below as stated by Petitioner Woodson Construction Company.

The following information may also assist the Court. The parent of Respondent, Amoco Pipeline Company, is Amoco Company, which is a wholly-owned subsidiary of Amoco Corporation.

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OPINION SOUGHT TO BE REVIEWED

Respondent Amoco adopts the statement of Petitioner Woodson concerning the opinion sought to be reviewed. Amoco also adopts the verbatim reproductions of the trial court opinion, the appellate court opinion and the appellate court's denial of rehearing, which are reproduced in the Appendix to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

Respondent Amoco adopts the statement of jurisdiction contained in the Petition for Writ of Certiorari.

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OCTOBER TERM, 1994

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v.

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On Petition for Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Amoco's Restatement of the Case

Woodson's Statement of the Case as it pertains to the course of the proceedings and the disposition in the district court is generally correct with respect to the underlying facts; however, it is not complete. Rule 15 of the *Supreme Court Rules* requires Amoco to point out the misstatements of fact and law that pertain to the "Questions Presented" by Petitioner.

Woodson failed to disclose that it had filed briefing with the Fifth Circuit specifically rejecting any need for remand for an opportunity for a jury trial or other fact finding. After making that election below, Woodson cannot now be heard to complain of a denial of due process.

More specifically, Woodson failed to point out to this Court that Amoco (not it) initially sought remand to the trial court on the matter in issue. In rejecting that opportunity, Woodson specifically told the Fifth Circuit that remand "would be uncalled for" and "any remand for a fact finding would be a useless act." (Petition at 224a and 227a, respectively).

In reliance on Woodson's unequivocal waiver of any right it might have had to a remand, Amoco changed the relief it sought before the Fifth Circuit. In particular, Amoco dropped its request for remand on the issue of Woodson's actual notice or knowledge of the indemnity agreement and asked the appellate court to reverse and render judgment, since (by Woodson's own admission) there was no fact issue in need of determination.

Woodson now seeks to reverse field and to have this Court relieve it of the effects of its election below. By its Petition, Woodson urges that its due process rights were violated by a denial of the opportunity for a jury trial on the precise issue (1) for which it had already informed the Fifth Circuit that no fact finding was necessary, and (2) upon which it had stipulated that the record was already complete.

B. Amoco's Summary of Relevant Facts

A brief recitation of the factual history of the case is necessary. Woodson and Amoco entered into a contract calling for Woodson to construct new pipelines in the Houston, Texas, area. During the construction of these pipelines, an explosion occurred injuring three of Woodson's employees. All three filed personal injury lawsuits against Amoco. Woodson then intervened in one of the underlying suits seeking recovery for damage to its equipment. Amoco cross-claimed against Woodson seeking contractual indemnity. Amoco never sought indemnity for its alleged negligence, but only for, and to the extent of, Woodson's negligence.

Amoco subsequently settled all three personal injury claims as well as other claims for property damage. Woodson stipulated that the total amount of $6.025 million paid by Amoco in these settlements, including attorneys' fees and costs, was reasonable. (Petition 15a).

The parties further stipulated that they were each 50% responsible for the underlying incident (Petition 15a) and submitted to the district court the limited question of whether Woodson was contractually required to reimburse Amoco for that portion of the settlement sums attributable to Woodson's stipulated liability. The trial court entered judgment for Woodson ruling that Amoco take nothing based on its interpretation that the contract at issue did not comport with Texas substantive law, specifically that the indemnity language failed to meet the express negligence test announced by the Texas Supreme Court in *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705 (Tex. 1987).[1]

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[1] The trial court's Findings of Fact and Conclusions of Law as well as its Final Judgment are reproduced as Appendices "F" and "C"

Amoco appealed and the Fifth Circuit Court of Appeals reversed and remanded for entry of judgment in light of its opinion.[2] The appellate court held Amoco's contractual indemnity claim meritorious precisely because Amoco was not seeking recovery for its own negligence, but rather only for that percentage of fault stipulated to by Woodson.

In support of that ruling, the appellate court found: (1) that the contract was a valid indemnity agreement meeting the requirements of Texas substantive law including the *Ethyl* express negligence test; and (2) that the recent Texas Supreme Court decision in *Page Petr., Inc. v. Dresser Indus. Inc.*[3], specifically permitted recovery in an indemnity situation where, as in this case, the indemnitor has actual notice or knowledge of its indemnity obligation. The Fifth Circuit expressly relied upon the uncontroverted and stipulated-to testimony of Petitioner's President, Louis Woodson, when concluding that Amoco met the latter notice standard.

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respectively to the Petition.

[2] The appellate court opinion is reproduced as Appendix "A" to the Petition.

[3] 853 S.W.2d 505 (Tex. 1993).

C. Proceedings Before The Fifth Circuit: Where The Stipulation and the Waiver Occurred

Several critical facts of the appellate process were also not detailed in Petitioner's Brief. Initially, Amoco's Appellant's Brief before the Fifth Circuit sought remand for a fact finding on the issue of whether Woodson had actual notice or knowledge of the indemnity agreement (the very issue upon which Woodson now assigns error). (Petition 179a, 182a).

In its Appellee's Brief, Woodson specifically informed the Fifth Circuit that remand was not necessary because the extent of Woodson's notice or knowledge had already been established and **"therefore any remand would be uncalled for."** (Petition 224a). Woodson went on to cite the very pages of Louis Woodson's deposition that Amoco referenced in its Brief (and the Fifth Circuit also relied upon in its Opinion) and again stated: **"Furthermore, as noted by Amoco on Page 10 of its brief, the extent of Woodson's notice and knowledge of the indemnity clause already appears in the record (R.I. 1073-71). Thus any remand for a fact finding would be a useless act."** (Petition 227a).

In reliance on Woodson's admission that no fact finding was necessary, Amoco changed the relief it sought, asking the appellate court to reverse and render, rather than remand. (See Amoco's Reply Brief, attached as Appendix, *infra*, A).

At no time prior to the issuance of an adverse ruling from the Fifth Circuit did Woodson ever raise this issue or even suggest to the intermediate court that remand was necessary, despite several opportunities to do so. For example, after Amoco filed its Reply Brief but prior to the issuance of the Opinion, Woodson amended the record and

filed a letter advising the Fifth Circuit of recent Texas case law which it felt was beneficial to its position (Appendix, *infra*, B). No mention was made of the need for any fact findings at that time.

Amoco then filed a Letter Brief in reply pointing out that the decision, cited by Woodson, in reality favored Amoco's position, a conclusion that the Fifth Circuit ultimately upheld to Woodson's chagrin. (Appendix, *infra*, C). Still, Woodson failed to mention that it believed that a trial or a fact finding would be necessary in this matter.

Following oral argument, the Fifth Circuit reversed the judgment in favor of Woodson and remanded the case to the district court for entry of judgment. Unhappy with the interpretation of the Texas case law it relied upon, Woodson next asked the Fifth Circuit to certify a question of law to the Texas Supreme Court. That request was denied. (Petition 8). Woodson's subsequent Petition for Rehearing before the Fifth Circuit was also denied. (Petition Appendix B).

Woodson now seeks discretionary review before this Court based on the "denial" of the right to a jury trial it had previously waived, over "facts" about which the record is undisputed.

ARGUMENTS

I.

BY JUDICIALLY ADMITTING THAT REMOVAL FOR A FACT FINDING ON THE ISSUE OF ACTUAL NOTICE OR KNOWLEDGE WAS UNNECESSARY, WOODSON STIPULATED TO THOSE FACTS AND SIMULTANEOUSLY WAIVED ANY RIGHT TO HAVE A JURY DECIDE THE ISSUE.

Woodson's sole point of error before this Court boils down to the argument that it was denied a right to a jury trial on the fact question of whether it had actual notice or knowledge of the indemnity language in its contract with Amoco. Woodson is incorrect as a matter of law.

As pointed out previously, Woodson's judicial admission in its briefing before the Fifth Circuit constitutes a stipulation of its actual notice and knowledge upon which the appellate court was entitled to, and expressly did, rely. (Petition 5a). Consequently, there is no disputed issue of material fact requiring a fact finding.[4]

Of course, Woodson also admitted as much when it told the Fifth Circuit that "any remand for a fact finding [on the notice issue] would be a useless act." (Petition 227a).

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[4] In Woodson's own words - **"the extent of Woodson's notice and knowledge has already been established, therefore, any remand would be uncalled for."** (Petition 224a, emphasis added).

Although Woodson now attempts to limit the scope of the stipulations of fact to those made at the trial court level (Petition 11), it is axiomatic that federal appellate courts may "appropriately treat statements in briefs as binding judicial admissions of fact." *City Nat'l Bank v. United States*, 907 F.2d 536, 544 (5th Cir. 1990).[5] Woodson cannot now be heard to complain that the Fifth Circuit erred in taking Woodson at its word that the record was clear that it had actual notice and knowledge of the indemnity provisions, and accordingly, that no fact-finding was necessary. Indeed, none could be needed precisely because the "facts" could not be in dispute following Woodson's admission before the appellate court.

Even if this Court feels a fact question might still exist, Woodson waived its right to a jury trial on that issue when it specifically requested the appellate court not to remand the case to the district court for such a fact finding. By definition then, the failure to remand cannot rise to the level of a deprivation of Woodson's due process rights.

As this Court has previously explained, the constitutional right to a jury trial can be waived. *United States v. Moore*, 340 U.S. 616, 621 (1951). A jury trial can

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[5] See also, *Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1880) ("The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced.... Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof."); *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 227 (9th Cir. 1988) (Statements of fact contained in a brief may be considered admissions of the party); *Plastic Container Corp. v. Continental Plastics of Oklahoma, Inc.*, 607 F.2d 885, 906 (10th Cir.), cert. denied, 444 U.S. 1018 (1980); and *Young & Vann Supply Co. v. Gulf, F. & A. R. Co.*, 5 F.2d 421, 423 (5th Cir. 1925).

be waived even without withdrawing a jury demand. *Casperone v. Landmark Oil & Gas Corp.*, 819 F.2d 112, 116 (5th Cir. 1987).

The test to determine whether a party has waived its right to a trial by jury is less stringent than the "intentional relinquishment or abandonment of a known right or privilege" test applicable to other constitutional rights. *Bellmore v. Mobil Oil Corp.*, 783 F.2d 300, 306 (2d Cir. 1986); *Bush v. Allstate Ins. Co.*, 425 F.2d 393, 396 (5th Cir.), cert. denied, 400 U.S. 833, rhr'g denied, 400 U.S. 985 (1970). In fact, this type of waiver can occur merely through the inadvertence of counsel in its briefing[6] or through a mistaken impression of the parties.[7]

Here, Woodson waived its right to a jury trial by taking the position in its Fifth Circuit briefing that "remand would be uncalled for" (Petition 224a) and that "any remand for a fact-finding would be a useless act." (Petition 227a). In a remarkably similar case, the Second Circuit upheld the waiver of a jury trial on specific issues based on the position taken by one of the parties in its briefing before the court. *Bellmore*, 783 F.2d at 306-07. See also, *Lovelace v. Dall*, 820 F.2d 223, 227 (7th Cir. 1987) (A waiver of a jury trial by stipulation under Rule 39(a) "has been interpreted broadly so as to encompass...briefs arguing that the judge can decide certain matters as a legal question.") and extensive cases cited therein.

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[6] *Bellmore*, 783 F.2d at 307; *Bush*, 425 F.2d at 395-96.

[7] *Sewell v. Jefferson County Fiscal Court*, 863 F.2d 461, 465-66 (6th Cir.), cert. denied, 493 U.S. 820 (1989).

As the Seventh Circuit explained, the principle justifying this waiver rule is that it is fundamentally "unfair to permit a party to have a trial, discover that it has lost, and then raise the jury issue because it is unsatisfied with the result...." *Lovelace*, 820 F.2d at 228.[8]

Of course, that is precisely what Woodson is attempting to do in this case. Amoco, not Woodson, requested the appellate court to remand this case if additional fact findings were necessary. When it thought it was winning, Woodson took the position in its briefing to the Fifth Circuit that there was no dispute about the extent of its notice and knowledge and that a remand for trial on that issue was unnecessary. Now that it lost that appeal it belatedly attempts to resurrect its "right to a jury trial," seeking relief under this Court's holding in *Byrd v. Blue Ridge Rural Elec. Co-Op, Inc.*, 356 U.S. 525 (1958).

As can be seen from the above discussion, *Byrd* is inapplicable because of the unique facts and the procedural posture of this case. For example, *Byrd* involved a situation where only one party submitted any evidence on the issue in dispute and this Court could not plainly say that the other side had agreed to submit the case on the basis of that evidence only. 356 U.S. at 533. Here, Woodson's Fifth Circuit briefing not only cited evidence in the record, it informed the appellate court that the extent of its notice and knowledge of the indemnity agreement "already appears in the record" and has therefore, "already been established."

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[8] "[T]his is not primarily a matter of fairness to the other party...[rather] the principal concern in this regard should be one of judicial economy; court judgments should have meaning and effect instead of being a futile exercise that one of the parties will be able to overturn no matter what the result." *Lovelace*, 820 F.2d at 228.

(Petition 227a & 224a respectively). By that judicial admission, Woodson removed itself from the factual parameters of *Byrd*.

Second and perhaps more importantly, Woodson, unlike *Byrd*, waived its right to a jury trial on this issue. By affirmatively representing to the appellate court that no remand for fact finding was necessary, Woodson also waived any right it might have had to rely on *Byrd* as a basis for seeking relief from this Court. It simply did not preserve its right to invoke that precedent.

II.

THE DOCTRINE OF INVITED ERROR BARS ANY REVIEW OF WOODSON'S PURPORTED LACK OF OPPORTUNITY TO LITIGATE THE NOTICE QUESTION

In reliance on the judicial admissions or stipulations of Woodson that the extent of its actual notice or knowledge was already before the court and remand was not necessary, Amoco changed the relief it sought before the appellate court. In fact, Amoco's first point in its Reply Brief to the Fifth Circuit expressed its reliance in no uncertain terms: **"Because Woodson has stipulated to the only potential fact issue, Amoco now seeks rendition of judgment rather than remand."** (Appendix, *infra*, A). Curiously, Woodson failed to include this Brief in its submissions to this Court.

At no point following the filing of this Reply Brief, did Woodson inform the court that remand was necessary or that Amoco was misleading the appellate court or misinterpreting its statements. Woodson did, however, file a letter brief informing the Court of Appeals of a recent

Texas decision which it felt was significant and beneficial to Woodson's position. (See, Appendix, *infra*, B&C).

It is readily apparent that Woodson knew of its right to supplement or correct any misconceptions, errors, etc. arising during the appellate process. Even with this knowledge, Woodson failed to seek any alternative relief from the Fifth Circuit. It also failed to indicate to that court that remand was a necessary remedy, or that reversing and rendering, as sought by Amoco, was improper. Nor did it indicate that a fact issue would exist if the Fifth Circuit concurred with Amoco's legal position. Woodson obviously knew that Amoco expressly changed its position in reliance on the referenced portion of Woodson's Brief. Given those affirmative misrepresentations and subsequent failures to speak up about the errors upon which its Petition is now based, the Doctrine of Invited Error applies to bar Woodson's request for an opportunity to further litigate the very matters it told the Fifth Circuit were not in issue.

The Doctrine of Invited Error states simply that a party may not complain on appeal of errors that he himself invited or acquiesced to or provoked the court or opposite party to commit. *Harvis v. Roadway Express, Inc.*,

923 F.2d 59 (6th Cir. 1991).[9] The Sixth Circuit referred to it as a "cardinal rule of appellate review." *Id.* at 60.

> The doctrine of "invited error" is a branch of the doctrine of waiver by which courts prevent the party from inducing an erroneous ruling and later seeking to profit from the legal consequences from having the ruling set aside. It is based on reliance interests similar to those that support the doctrines of equitable and promissory estoppel. **Having induced the court to rely on a particular erroneous proposition of law or fact, a party in the normal case may not, at a later stage of the case, use the error** to set aside the immediate consequences of the error....The consequences of Plaintiff's actions forecloses his request for

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[9] Although Shepherd's reflects that this decision was reversed, a careful review of the cases reveals that is not correct. Harvis' claims were severed from the other two plaintiffs, Maurice Rivers and Robert Davison, and was tried separately resulting in the cited opinion reported at 923 F.2d 59 (6th Cir. 1991).

Rivers and Davison's claims were later tried and appealed - on wholly different issues - but initially under the *Harvis v. Roadway Express, Inc.* style. The Sixth Circuit's opinion in that case reversed the district court's judgment, but made no reference to the original *Harvis* decision, nor could it because Harvis himself was no longer a party to the litigation. Harvis' name was ultimately deleted when Rivers and Davison's claims progressed to this Court. See, e.g., *Harvis v. Roadway Express*, Inc., 973 F.2d 490 (6th Cir.), cert. granted in part, *Landgraf v. USI Film Products*, ___ U.S. ___, 113 S.Ct. 1250, 122 L.Ed.2d 649 (1993), aff'd sub nom, *Rivers v. Roadway Express, Inc.*, ___ U.S. ___, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994).

> a remand to the district court. *Harvis* 923 F.2d at 61 (emphasis added).[10]

Federal courts have long held that a party cannot subsequently complain of error when it asked the appellate court to decide a question before it in a particular manner. *Glassman Constr. Co., Inc. v. United States*, 421 F.2d 212, 215 (4th Cir. 1970). In this case, Woodson specifically asked the appellate court not to remand for a fact finding. The Fifth Circuit relied on Woodson's statements in rendering its judgment. As the Fourth Circuit succinctly put it: a party "should not be heard now to complain that we did what it asked of us" *Id.* at 215. Under the equitable Doctrine of Invited Error, Woodson is now estopped from assailing the court of appeals' decision.

III.

WOODSON'S PETITION IS FATALLY DEFECTIVE BECAUSE IT ADDRESSES ONLY ONE OF THE TWO INDEPENDENT BASES FOR THE FIFTH CIRCUIT'S RULING

The issue before the lower courts was whether the indemnity language in the Woodson-Amoco contract was enforceable under Texas law. Woodson argued that the indemnity clause was invalid because it did not comply with the express negligence test announced by the Texas Supreme Court in *Ethyl*, supra. Amoco disputed the applicability of the pure express negligence test and argued further that if the test applied, the contract fell within the exception created in *Page*, supra. (See, e.g., Appendix, *infra*, A & C and Petition 179a).

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[10] See also, *Illinois Cent. R. Co. v. Egan*, 203 F. 937, 939 (8th Cir. 1913).

The Fifth Circuit Opinion recited two independent bases for its decision. Initially, the appellate court noted that Amoco was not seeking indemnification for its own negligence, but only recovery for that amount of negligence attributable to Woodson. The Fifth Circuit saw "nothing in Texas law to defeat enforceability of this agreement. Assuming, without deciding, that under *Ethyl*..., Amoco must meet the express negligence test even though it seeks recovery only for Woodson's negligence (indemnification of comparative fault), we find the contract to be enforceable." (emphasis added) (Petition, 5a).

In short, the appellate court held that even if Woodson was right and Amoco had to meet the strict *Ethyl* contract construction test, the contract language in question met that test.

In neither its Petition for Rehearing nor its Petition for Writ of Certiorari does Woodson ever address this crucial portion of the Fifth Circuit's decision. Woodson never comes to grips with the fact that the Fifth Circuit ruled, as a matter of law, that the contract language met the requirements of Texas substantive law. Rather, Woodson's Petition addresses only the second prong of the Fifth Circuit ruling related to the *Page* exception. (Petition 11-17). Consequently, Woodson waived any right to challenge this other adequate and independent ground for affirmation. Rule 14.1(a), *Supreme Court Rules*; *Taylor v. Freeland & Kronz*, _____ U.S. _____, 112 S.Ct. 1644, 1649, 118 L.Ed.2d 280 (1992). Hence, even if this Court should find some procedural error otherwise worthy of remand, which Amoco denies, this Court cannot reverse the appellate court because any challenges to the adequate and independent ground of recovery found by the Fifth Circuit have been waived.

IV.

THE APPELLATE COURT'S INTERPRETATION OF THE CONTROLLING STATE LAW IS NOT CLEARLY ERRONEOUS, AND THEREFORE, IS NOT REVIEWABLE BY WRIT OF CERTIORARI

Woodson's Petition expends almost 50% of its argument on a question of substantive state law neither raised in its "Question Presented" for decision by this Court, nor even relevant to its constitutional due process claims. (Petition 14-17). The issue before this Court is whether the Fifth Circuit should have remanded this case for further fact finding, not whether the appellate court "blatantly misinterpreted Texas Law" applicable to the interpretation of indemnity contracts. Ironically, Woodson acknowledges the irrelevancy of its arguments in this regard when attempting to belatedly frame an additional ground for appeal in a footnote alleging a generic violation of *Erie* principles. (Petition 17, n.4).

Assuming that Woodson is seriously asking this Court to substitute its interpretation of Texas substantive law for that of the lower federal courts, Amoco is compelled to point out that Woodson neither properly preserved nor presented this issue for appeal. Moreover, it fails to demonstrate that the lower court's interpretation is sufficiently erroneous to invoke review by this Court.

As even Woodson's flagship case holds, this Court "ordinarily accepts the interpretation of local law by the Court of Appeals." *Byrd*, 356 U.S. at 529-530. In fact, this Court has often explained that it will not disturb a lower court's interpretation of state-law issues unless the petitioner carries the heavy burden of establishing that the holding at

issue is "clearly wrong,"[11] "clearly erroneous,"[12] or completely "unreasonable;"[13] none of which are applicable in this case.

When all is said and done, what remains clear is that the parties and the lower courts disagreed over the interpretation of the controlling state law. Under those circumstances, the appellate court's interpretation cannot be said to be either totally unreasonable (*Propper*) or plainly erroneous. *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943).

For example, as Amoco successfully argued below, there is ample Texas precedent to support the enforceability of the indemnity agreement in the Woodson-Amoco contract. The Texas Supreme Court addressed the requirements necessary to enforce an indemnity clause in the case of *Page Petr., Inc. v. Dresser Indus., Inc.*, supra, and held that indemnity agreements must meet the fair notice requirements of express negligence and of conspicuousness. The *Page* court went on to say, however, that the fair notice requirements "are not applicable when the indemnitee establishes that the indemnitor possessed actual notice or knowledge of the indemnity agreement." *Id.* at 508 and n.2. The thrust of Woodson's "point of error" in this regard is that the Fifth Circuit's literal reading of this language allegedly does not comport with the remainder of the case. (Petition 15-17).

Subsequent to the *Page* decision, the Texas 14th Court of Appeals held that in a situation where the

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[11] The *TUNGUS v. Skovgaard*, 358 U.S. 588, 596 (1959)

[12] *United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960)

[13] *Propper v. Clark*, 337 U.S. 472, 486-87 (1949)

indemnitee is not seeking recovery for its own negligence, but rather is seeking recovery for the negligence of the indemnitor (as in this case), the express negligence test announced by the Texas Supreme Court is not applicable. *MAN GHH Logistics Gmbh v. Emscor, Inc.*, 858 S.W.2d 41 (Tex. App.-- Hous. [14th Dist.] 1993, n.w.h.). Hence, it is clear that the Fifth Circuit's judgment is supported by ample Texas substantive law. Simply because Woodson's interpretation differs from that of the appeals court does not render the decision "clearly erroneous" nor does it warrant the issuance of a Writ in this case.

V.

WOODSON OFFERS NO "SPECIAL AND IMPORTANT REASONS" FOR GRANTING DISCRETIONARY REVIEW OF THIS CASE, AND NO SUCH REASONS EXIST

Rule 10 of the *Supreme Court Rules* states that "[a] Petition For A Writ Of Certiorari will be granted only when there are special and important reasons therefore." Woodson has failed to show any reasons exist in this case. Indeed, Woodson's Petition conclusively shows that no such reasons exist, as the following demonstrates:

1. The underlying dispute involves the interpretation of rights and liabilities of a construction contract, matters of state law. Thus, the substantive dispute between Woodson and Amoco is purely a matter of Texas state law and does not even remotely implicate a federal interest.

2. As the Petition notes, the Fifth Circuit issued a *per curiam*, Do Not Publish Opinion. Hence it is apparent that this Opinion is one that applies only to two

corporations and has little precedential effect on federal or even state interests.

3. In the same vein, it is worth noting that this case was brought in federal court because the underlying personal injury plaintiffs and the parties are diverse under 28 U.S.C. §1332 (Appendix, *infra*, D). In essence, Woodson asks this Court to sit as a super-supreme court for the State of Texas. Where there are no federal or constitutional questions at issue, there is no reason for this Court to take on that role.

4. Perhaps mindful of a lack of any federal interests in the underlying substantive contract case, Woodson argues that the appellate court committed procedural errors as well as reached an improper result in the hopes of creating a federal interest. In so arguing, Woodson is asking this Court to act as an error-corrector rather than as a law-declarer, a request which simply cannot be "special and important" within the meaning of Rule 10.

5. Woodson does not and cannot contend that the appellate decision sets any sort of broad precedent, but argues only that the decision adversely affects its own interests. In seeking discretionary review of such a decision, Woodson overlooks the fact that this Court, unlike a federal Circuit Court of Appeals, "does not sit for the benefit of the particular litigants," and that the "special and important reasons" requirement implies "a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). As an earlier case had said

> [I]t is very important that we be consistent in not granting the Writ of Certiorari except in cases involving principles the

> settlement of which is of importance to the public, as distinguished from that of the parties....

Layne & Bowler Corp v. Western Well Works, Inc., 261 U.S. 387, 393 (1923).

Specific procedural errors with no federal implications and no precedential importance are simply not "special and important" cases within the meaning of Rule 10 of this Court's rules. Even if Woodson's allegations of procedural and substantive error were correct, which Amoco denies, review by this Court would not be warranted.

SUMMARY AND CONCLUSION

Woodson asks this Court to grant a Writ of Certiorari and reverse the Fifth Circuit Court of Appeals due to an alleged deprivation of its due process rights. In its Petition, Woodson failed to notify this Court that it admitted the very fact issue upon which it bases this deprivation; hence, no dispute of material fact on the notice or knowledge issue exists. Woodson further failed to acknowledge in its Petition that it waived any right to trial by other judicial admissions before the appellate court. The Fifth Circuit expressly relied on these admissions in rendering its decision. Consequently, Woodson cannot now complain of error and seek trial on the very issues to which it earlier stipulated and waived any right to a jury trial.

Furthermore, Woodson specifically asked the appellate court not to remand for a fact-finding on the issue of its actual notice or knowledge. Amoco relied on these admissions and subsequently changed the relief it sought from the appellate court. The appellate court also relied on

these judicial admissions. Hence, the Doctrine of Invited Error applies and Woodson is estopped from now seeking the same relief it previously told the lower court was unnecessary and inappropriate.

Woodson's Petition is fatally flawed because it failed to assign as error one of the two independent bases under state law upon which the Fifth Circuit based its decision. By waiving its right to challenge that issue, Woodson has rendered this appeal moot.

Although Woodson irrelevantly attacks the interpretation of state law rendered by the Fifth Circuit, it is obvious that holding is correct and supported by ample Texas precedent. Woodson's allegation of blatant misinterpretation of Texas law is based on nothing more than conflicting views of a footnote in the *Page* decision. Even if Woodson's view is correct, that does not rise to the standard of clearly erroneous interpretation of state law, and does not justify discretionary review by this Court.

Woodson has asked this Court to review a *per curiam*, "Do Not Publish" appellate decision involving Texas contract and indemnity law, which does not in any way involve any interest other than those of the parties and does not implicate any federal interests. Woodson does not argue that the alleged procedural errors have any precedential importance, but simply argues the Fifth Circuit has reached

an improper result. This case, then, affects only the rights of the particular litigants and has no far-reaching federal or constitutional implications. In sum, it is not a case appropriate for review by this Court under Rule 10 of the *Supreme Court Rules*. The Petition should be denied.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 93-2138

ROBERT LEE HAMILTON, ET AL.,
Plaintiffs,

VS.

AMOCO PIPELINE COMPANY,
Defendant-Third Party
Plaintiff-Appellant

VS.

WOODSON CONSTRUCTION COMPANY
Third Party Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION

REPLY BRIEF FOR DEFENDANT-THIRD
PARTY PLAINTIFF-APPELLANT
AMOCO PIPELINE COMPANY

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U.S. COURT OF APPEALS
FILED
AUG 18,1993
RICHARD E. WINDHORST, JR.
CLERK

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and companies have an interest in the outcome of this case. This representation is made in order that Judges of this Court may evaluate possible disqualification or recusal.

Parties: Amoco Pipeline Company
Defendant-Third Party
Plaintiff-Appellant

Woodson Construction Company
Third Party Defendant-
Appellant

Counsel: Edward J. Murphy
Gerard J. Kimmitt
John F. Waldo
BELL & MURPHY
Houston, Texas

Bradley M. Bingham
BINGHAM & MANN
Houston, Texas

Insurers: Liberty Mutual Insurance Company
(Woodson's insurer)

Vesta Insurance Company
(Amoco's insurer)

Note--The named plaintiffs, Robert Lee Hamilton et al., have received settlements from Amoco Pipeline Company and/or its insurers, and are therefore not persons interested in the outcome of this appeal despite their nominal status as parties.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 93-2138

ROBERT LEE HAMILTON, ET AL.,
Plaintiffs,

VS.

AMOCO PIPELINE COMPANY,
Defendant-Third Party
Plaintiff-Appellant

VS.

WOODSON CONSTRUCTION COMPANY
Third Party Defendant-Appellee

I.

BECAUSE WOODSON HAS STIPULATED TO THE ONLY POTENTIAL FACT ISSUE AMOCO NOW SEEKS RENDITION OF JUDGMENT RATHER THAN REMAND.

Because of an important concession in Woodson's brief, this Court is now in a position to render a final judgment rather than remanding the matter.

As Woodson correctly notes, Amoco argued that it "is entitled under the Woodson/Amoco contract to be reimbursed

for monies it paid in settlement" in proportion to the degree that Woodson's negligence proximately caused the underlying loss. (Woodson brief at 10). The parties had stipulated that each was 50% at fault, and that Amoco reasonably and necessarily paid $6,025,000 to settle the underlying cases, (R. 1048-47), so Amoco was seeking $3,012,500, plus interest. However, the trial court ruled that the Woodson/Amoco contract did not meet the express negligence test of Ethyl Corp. v. Daniel Construction Co., 725 S.W.2d 705 (Tex. 1987), and that therefore, Amoco could not recover.

On appeal, Amoco argued that under the recent case of Page Petroleum Inc. v. Dresser Industries, Inc., 36 Tex. S. Ct. J. 737 (April 7, 1993), decided after the trial court's judgment, the express-negligence requirement does not apply where the indemnitor has actual knowledge of the indemnity provision. Amoco asked this Court to apply Page, and to remand for trial court fact-finding on whether Woodson had actual knowledge of the indemnity provision. However, Woodson concedes in its brief that the record reflects Woodson's "notice and knowledge of the indemnity clause." (Brief at 14), and states that therefore, remand would be needless. (Brief at 15). Based on that concession, Amoco now asks this Court to reverse the trial court's decision, and render judgment that Amoco recover $3,012,500, plus interest.

II.

REPLY TO WOODSON'S ARGUMENTS

A. The Outcome Of This Case Does Not Depend On The Difference Between 'Indemnity' and 'Contribution.'

Woodson initially gets lost in a semantic thicket arguing about the differences between indemnity and contribution. Woodson argues that indemnity means the shifting of an entire loss, whereas contribution means the shifting of a partial loss. Woodson seemingly suggests that because Amoco is seeking recovery only in proportion to Woodson's negligence, Amoco must be seeking contribution, but that Amoco has made a claim only for indemnity.

This indemnity/contribution argument is a non-issue. Another difference between the words "contribution" and "indemnity" is that "contribution" is a statutory right to apportion a loss, whereas "indemnity" is a contractual right. That being so, neither word, standing alone, may precisely fit, Amoco's claim for loss sharing[1] (as opposed to loss shifting) arising out of a contract. But the fact that no one single word precisely describes the relief Amoco is seeking does not mean that Amoco has no claim. As all parties have clearly understood from the inception of this action, Amoco is seeking to recover in proportion to Woodson's negligence, and is basing its claim on the Woodson/Amoco contract.

In the case of Ethyl Corp. v. Daniel Construction Co., supra, 725 S.W.2d 705, 708 (Tex. 1987), the Texas Supreme Court specifically addressed a claim identical to Amoco's, and referred to the claim as one for "comparative indemnity." The Supreme Court denied comparative indemnity in Ethyl, but not because no such animal exists. Rather, the Supreme Court said that a contract must meet the express negligence test in order to support a claim for

---

[1] Phrased yet another way, Amoco is seeking to be indemnified for the entirety of the loss that Woodson caused, but not for the loss that Amoco itself caused. Such a claim would have to be based on contract, because otherwise, an action against Woodson would be barred by the protective provisions of the worker's compensation act.

comparative indemnity, and the Court said that the contract at issue in Ethyl failed to meet that test. Likewise, the trial court denied Amoco any recovery in this case not because Amoco's claim did not exist, but because, in the trial court's view, the Woodson/Amoco contract also failed to meet the express negligence test for comparative indemnity. The issue, then, is not what Amoco's claim might be called, but rather, whether the express negligence doctrine of Ethyl bars Amoco's claim.

B. The New Page Case Makes The Express-Negligence Test Inapplicable Where, As Here, The Indemnitor Has Actual Knowledge Of The Indemnity Requirement.

Amoco's principal appellate point is that under Page, the Ethyl express-negligence doctrine does not apply where the indemnitor has actual knowledge of the contractual indemnity provision. In response, Woodson makes four arguments. First, Woodson argues that the Page case does not address the express negligence test, but applies only to the requirement that an indemnity provision be conspicuous. Second, Woodson suggests that Page applies only to release agreements, and not to indemnity agreements. Third, Woodson argues that the impact of Page is to make the "fair notice" requirements matter of law, not matters of fact. Finally, Woodson says that if the Texas Supreme Court intended to "overrule" Ethyl, it would do so in text, not in a footnote.

Those arguments ignore the actual language of the Page decision, ignore Amoco's arguments, or both.

1. **Woodson's argument that Page involves only the requirement of conspicuousness ignores the repeated statements that the fair notice requirements--plural--include both conspicuousness and the express negligence doctrine.**

Woodson's argument that Page deals only with the conspicuousness requirement requires this Court to ignore the plain language of the case. The Texas Supreme Court framed the issue in Page as follows:

> We must first determine whether the fair notice requirements of conspicuousness and the express negligence doctrine apply to releases as well as to indemnity agreements .

Page Petroleum, Inc. v. Dresser Industries, Inc., 36 Tex. S. Ct. J. 737, 738 (April 7, 1993). We call this Court's attention to the use of the plural word "requirements." Plainly, the Texas Supreme Court was saying that there are two requirements of fair notice--conspicuousness and the express negligence doctrine.

Later in the opinion, the Supreme Court again makes that point even more unmistakable. The Page opinion states:

> Because indemnification of a party for its own negligence is an extraordinary shifting of risk, this Court has developed fair notice requirements which apply to these types of agreements. The fair notice requirements include the express negligence doctrine and the conspicuousness requirement. [citation omitted]. The express negligence doctrine

> states that a party seeking indemnity from the consequences of that party's own negligence must express that intent in specific terms within the four corners of the contract. [citing Ethyl].

(Id. at 739, emphasis added). Again, the Supreme Court is stating in language too plain for dispute that the fair notice requirements--plural--are the express negligence doctrine and conspicuousness.

The statement in Page that is critical for this case is a footnote that appears after the first sentence quoted in the immediately preceding passage. In that footnote, the Texas Supreme Court says:

> **The fair notice requirements are not applicable when the indemnitee establishes that the indemnitor possessed actual notice or knowledge of the indemnity agreement.**

Id. at 739 & n.2. Again, the Supreme Court uses the plural "fair notice requirements," which it has already repeatedly defined as meaning both conspicuousness and the Ethyl express negligence doctrine. The Court states that those requirements--both of them--are inapplicable where the indemnitor has actual notice or knowledge of the indemnity requirement.

For the foregoing reason, Woodson's argument that the actual-knowledge exception of Page applies only to the conspicuousness requirement must be rejected.

2. Woodson's suggestion that Page applies only to releases ignores the explicit references to "indemnitees," "indemnitors" and "indemnity agreements."

Similarly, Woodson suggests that Page involved only releases, and not indemnity agreements. Again, that argument ignores the plain language of the opinion.

In the critical footnote, the Supreme Court said that the fair notice requirements do not apply when the "indemnitee" shows that the "indemnitor" had actual notice or knowledge of the "indemnity agreement." It is fatuous to suggest that when the Texas Supreme Court spoke of "indemnitees," "indemnitors" and "indemnity agreements," it really meant "releases," "releasors" and "release agreements."

Whatever Page may mean, there can be no disputing the fact that the case applies to indemnity agreements.

3. Amoco does not suggest that the fair notice requirements are issues of fact, but suggests only that the actual knowledge exception is an issue of fact, and that fact issue has been mooted by Woodson's stipulation of actual knowledge of the indemnity provision.

Woodson further suggests that the import of Page was to clarify that compliance vel non with the fair notice requirements is a question of law, rather than a question of fact. (Brief at 11, 19). Amoco does not suggest otherwise. It is the actual knowledge exception, not the fair notice requirements, that Amoco asserts is an issue of fact.

Again, Amoco had originally sought a remand to give the trial court the opportunity to ascertain whether Woodson had actual knowledge of the indemnity provision in the Woodson/Amoco contract. In making that suggestion, Amoco cited deposition testimony from Woodson's president in which he said that his understanding of the indemnity provision in the Woodson/Amoco contract was that Woodson would pay to the extent of its negligence, and Amoco would pay to the extent of its negligence. Rather than insist upon a remand for fact-finding, though, Woodson has graciously stipulated in its brief that it did have actual knowledge of the indemnity agreement. Therefore, if this Court agrees with Amoco's interpretation of Page, it can simply reverse the trial court's judgment and render a judgment that Amoco recover 50% of the amount paid to settle the underlying cases, of $3,012,500, together with appropriate prejudgment and postjudgment interest.

4. Page does not overrule Ethyl, but only limits and clarifies it, and the fact that the critical language was contained in a footnote does not diminish the force of the Page decision.

Woodson's final attack on Page is to state that if the Texas Supreme Court meant to "overrule the established, black letter law of Ethyl, it would have done so in the body of the opinion, rather than in a footnote." (Brief at 19).

Amoco's first response to that argument is to note that Page does not overrule Ethyl at all, but merely limits its application. Page reaffirms that an indemnity provision must meet the express-negligence test to be valid. Page only states that the test does not apply where the indemnitor had actual knowledge of the provision.

This exception is consistent with the stated purpose of the Ethyl express negligence requirement, which was to prevent surprise and unwitting indemnity provisions. The problem that the Texas Supreme Court addressed in Ethyl was the problem of devious drafters cleverly obscuring their intent.[2] As the Court said:

> [T]he scriveners of indemnity agreements have devised novel ways of writing agreements which fail to expressly state the true intent of those provisions. The intent of the scriveners is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that intent from the indemnitor.

Id., 725 S.W.2d 707-08. In Page, the Supreme Court did no more than restate the obvious--if a party actually knows what he is required to do, then he cannot claim to have been victimized by devious draftsmanship.

Amoco does not share Woodson's appreciation for the fact that the critical language in Page is contained in a footnote, rather than in the body of the text. Amoco is unaware of any principle of law suggesting that an unambiguous directive from a state's highest court may be disregarded simply because that directive appears in a footnote.

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2 The Texas Legislature addressed a different problem, that of unequal bargaining power, in the Texas Oilfield Indemnity Act, (TOIA), Tex. Civ. P. & Rem. Code § 127.001 et seq. The Legislature found that certain indemnity provisions work "an inequity" on indemnitors, § 127.002(a), and the TOIA imposes restrictions on indemnity agreements covered by the statute. No one has contended that the TOIA applies to this case, and the statute specifically exempts pipelines, § 127.001(4)(b)(ii). By excepting pipeline contracts from the act designed to regulate potentially unfair indemnity agreements, the Legislature has tacitly declared that unfairness is not a problem in those contracts.

For all of the foregoing reasons, Amoco submits that Page controls this appeal. Now that Woodson has stipulated that it did have such actual notice or knowledge, and that a remand is not necessary, Amoco asks this Court to reverse the trial court's judgment against Amoco, and render judgment in Amoco's favor for $3,012,500, plus prejudgment and post-judgment interest.

C. Even Without The Page Case, Amoco Would Still Be Entitled To Reimbursement In Proportion To Woodson's Negligence.

Amoco's second argument is that even if Woodson's indemnity promise is unenforceable because it fails to meet the express negligence requirement, Woodson made a separate reimbursement promise to which the express negligence doctrine does not apply. Amoco based its argument on the case of Getty Oil Co. v. Insurance Co. of N. America, 845 S.W.2d 794 (Tex. 1992). That case, which was also decided after the trial court rendered judgment for Woodson in this case, held that the express negligence doctrine applies only to indemnity covenants denominated as such, and does not apply to independent covenants such as a promise to name a party as an additional insured, even though that independent covenant might accomplish the same thing as the indemnity covenant. Amoco noted that in the Woodson/Amoco contract, Woodson promised not only to indemnify Amoco, but also to reimburse Amoco for losses caused by Woodson's own negligence. Amoco argued that because the reimbursement promise was separate from the indemnity promise, the reimbursement promise is not subject to the express negligence doctrine.

Woodson does not directly address this argument in its brief. It argues that the reimbursement provision "does not meet the requirements of Ethyl," (Brief at 21). Amoco

has not argued that the reimbursement provision meets the Ethyl requirements, but rather, has argued that the reimbursement provision is not subject to the Ethyl requirements.

Ironically, Woodson's brief assists Amoco. Woodson notes that under general rules of contract interpretation, a court "should examine and consider the entire writing in an effort to harmonize and give effect to all of the contract provisions so that none will be rendered meaningless." (Brief at 21). But having correctly quoted the rule, Woodson asks this Court to simply ignore the reimbursement provision, and concentrate only on the indemnity provision, which has the effect of rendering the reimbursement provision meaningless.

It may be true that the indemnity and reimbursement provisions could lead to essentially the same result in this case. But that in no way undercuts Amoco's argument. The undeniable fact is that both provisions are in the contract. One benefit of redundancy, if redundancy there be, is that if one provision fails for whatever reason, the other provision may still accomplish the drafter's purpose.

For the foregoing reasons, Amoco asks that if this Court does not believe it can enforce the indemnity provision in the Woodson/Amoco agreement because of the Ethyl case, it enforce the reimbursement provision, which Amoco submits is not subject to Ethyl.

D. Woodson's Own Brief Shows Why Justice Requires That If Amoco Receives No Other Relief, It Should Be Allowed To Withdraw Its Stipulation Of 50% Fault.

Finally, Woodson argues that Amoco should not be allowed to withdraw its stipulation of 50% fault. First, Woodson argues that Amoco's mistake was unilateral only, and that Woodson always thought that the trial court might enter judgment in its favor. Second, Woodson argues that the stipulation did not actually harm Amoco. Woodson says that under Ethyl, any negligence on Amoco's part would bar Amoco's recovery in toto. Woodson further points out that Amoco never disputed that it might be negligent to some degree, as evidenced by the fact that it sought recovery not for the entire settlement amount, but only for that amount proportional to Woodson's degree of fault. In so arguing, Woodson perfectly demonstrates Amoco's point.

Woodson is quite correct in arguing (Brief at 25-26) that if the Ethyl rule were applied and if the Woodson/Amoco contract were determined not to satisfy that rule, then even 1% fault on Amoco's part would bar Amoco's recovery. Woodson correctly reads Ethyl as applying only to situations where the indemnitee (Amoco) is negligent. Under Ethyl, then, the sole issue in this case would be whether Amoco was negligent to any degree.

Yet as this Court is aware, when the trial court denied Woodson's motion for summary judgment, it said that the fact issue was the degree of Woodson's negligence, not Amoco's negligence. As Amoco was aware then and as Woodson now correctly notes, Woodson's negligence would be totally irrelevant under Ethyl. So when the trial court said that Woodson's negligence was the dispositive issue, Amoco drew the only conclusion that it could draw, which was that the trial court believed Ethyl did not apply.

Again, Amoco submits that this is an unusual situation, and that unusual relief may be appropriate. If Amoco receives no other relief from this Court, it would ask

that the Court carefully consider whether basic fairness demands that Amoco be permitted to withdraw its stipulations.

III.

SUMMARY AND CONCLUSION

The trial court held that Amoco was not entitled to recover its settlement payments from Woodson in proportion to Woodson's fault because the Woodson/Amoco contract did not meet the express negligence test of Ethyl Corp. v. Daniel Construction Co., 725 S.W.2d 705 (Tex. 1987). While this appeal was pending, however, the Texas Supreme Court ruled in the case of Page Petroleum Inc. v. Dresser Industries, Inc., 36 Tex. S. Ct. J. 737 (April 7, 1993) that the express-negligence requirement does not apply where the indemnitor has actual knowledge of the indemnity provision. Amoco originally sought a remand to determine whether Woodson had actual knowledge of the indemnity requirement. In its brief, Woodson stipulated that such actual knowledge existed, and that remand is not necessary. Therefore, based on Page, Amoco now asks this Court to reverse and render judgment in its favor for $3,012,500, a sum based on the parties' stipulations concerning apportionment of fault and reasonable amounts paid to settle the underlying claims.

Alternatively, Amoco has argued that Getty Oil Co. v. Insurance Co. of N. America, 845 S.W.2d 794 (Tex. 1992) applies the Ethyl express-negligence rule only to indemnity provisions denominated as such. The Woodson/Amoco contract contains not only an indemnity provision but a reimbursement provision. Amoco submits that under Getty, the reimbursement provision is not subject to Ethyl, and can be enforced.

Finally, Amoco asks that if all other relief is denied, it be permitted to withdraw its stipulations. Those stipulations were entered into on the reasonable belief that the trial court was not going to apply the Ethyl rule to the Woodson/Amoco contract. That belief was reasonable because under Ethyl, the dispositive issue would be whether Amoco was negligent in whole or in part, however slight. When the trial court ruled on summary judgment that the dispositive issue was Woodson's negligence, Amoco believed that the trial court was not going to apply Ethyl, under which Woodson's negligence would be totally irrelevant.

For all of the foregoing reasons, Amoco asks this Court to reverse the take-nothing judgment of the trial court and to render judgment in Amoco's favor for $3,012,500, plus interest, or, alternatively, to remand the proceedings with directions that Amoco be allowed to withdraw its stipulations.

DATED this 17th day of August, 1993.

By: /s/ Gerard J. Kimmitt

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CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies the foregoing REPLY BRIEF FOR DEFENDANT-THIRD PARTY PLAINTIFF-APPELLANT AMOCO PIPELINE COMPANY were sent via hand delivery to:

Bradley M. Bingham, Esq.
Bingham & Mann
1221 Lamar, Suite 1300
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on this 7th day of August, 1993.

/s/ Gerard J. Kimmitt
Gerard J. Kimmitt

APPENDIX B

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August 24, 1993

Richard E. Windhorst, Jr.
Office of The Clerk
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
600 Camp Street
New Orleans, Louisiana 70130

RE: Cause No. 93-2138; Hamilton vs. Amoco vs. Woodson Construction (D.C. #CA-H-4158); United States Court of Appeals, Fifth Circuit

Dear Mr. Windhorst:

On behalf of Appellee Woodson Construction Company, I have recently learned of an appellate decision in Texas which contains pertinent and significant authority in support of Appellee's position. This decision, a copy of which is enclosed, did not come to my attention until after Appellee's Brief had been filed.

We would appreciate your bringing the enclosed decision to the attention of the Court.

Sincerely,

/s/ Bradley M. Bingham
Bradley M. Bingham

BMB/mh

cc: Mr. Ed Murphy

AUG 27 1993

Affirmed and Opinion filed July 1, 1993.

(SEAL)

In The
Fourteenth Court of Appeals

NO. C14-92-01254-CV

MAN GHH LOGISTICS GMBH, FKA MAN GHH KRANTECHNIK GMBH AND FKA M.A.N., WOLFFKRAN GMBH, MAN GH CORP., FKA AMERICAN M.A.N., CORP., MAN GUTEHOFFNUNGSHUTTE AG, FKA MAN GUTEHOFFNUNGSHUTTE GMBH, AND WOLFFKRAN AMERICAN, INC., FKA EMSCOR WOLFF RENTALS, INC., AND DBA E.W.R., A WOLFFKRAN COMPANY, Appellants

V.

EMSCOR, INC., AND WALTER MANNING, JR., Appellees

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 87-20154-A

OPINION

Appellants and appellees, by cross-point, both appeal from summary judgments. The parties sought indemnification form each other for funds voluntarily paid in settlement of a wrongful death suit. The parties contend they are entitled to reimbursement from each other through contractual contribution. We disagree and affirm the judgment of the trial court.

On April 25, 1987, three men were killed and one man injured when a 152' tower crane fell over while it was being dismantled. Approximately two years prior to the accident, in May, 1985, Emscor sold its crane fleet, including the crane involved in this accident, to appellants. Emscor continued managing the crane fleet until January 1987, four months before the accident, when Emscor's management contracts were terminated. The families of two of the men killed filed suit against appellants and Emscor. In October 1990, appellants voluntarily settled the two death claims for $3,000,000. In November, 1990, Emscor and Manning (former president of Emscor) agreed to a $3,000,000 judgment in favor of the two families.

Appellants contend appellees are responsible for the accident because Emscor erected the tower crane with twelve center ballast weights, instead of fourteen center ballast weights. The center ballast weights are placed on the base of the tower crane to maintain its stability. Appellees contend the accident was caused by the improper dismantling procedure of appellants.

Appellants sought reimbursement from appellees for the $3,000,000 appellants voluntarily paid to the two families. Appellees moved for summary judgment, which

was granted. Appellees in turn, sought indemnity from appellants. Appellants moved for summary judgment, which the trial court also granted. Both parties appeal the granting of the summary judgments.

A summary judgment will be upheld on appeal only if the movant has conclusively established there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. *Davis v. Houston Independent School District*, 654 S.W.2d 818, 820 (Tex. App.--Houston [14 Dist.] 1983, no writ). The summary judgment evidence is considered in the light most favorable to the party opposing the motion. *Gonzales v. Global Truck & Equipment, Inc.*, 625 S.W.2d 348, 350 (Tex. Civ. App.--Houston [1st Dist.] 1981, no writ). All doubts concerning the existence of a genuine issue of material fact should be resolved against the movant. *Id.* All conflicts in the evidence must be disregarded and the evidence that tends to support the position of the non-movant is accepted as true. *Id.*

The question to be determined on appeal is whether the summary judgment proof establishes as a matter of law that there is no genuine issue of fact as to one or more of the essential elements of plaintiff's cause of action. *Gibbs v. General Motors*, 450 S.W.2d 827, 828 (Tex. 1970).

In three points of error, appellants argue the trial court erred in granting appellee's motion for summary judgment because application of the "express negligence rule" was premature and improper; appellants' claim for contractual contribution survives a voluntary settlement and is not barred by the express negligence rule; and satisfaction of the express negligence rule should not be a prerequisite to recovery of contractual contribution and/or contractual

comparative indemnity. We will address appellants' three points of error together.

Appellants acknowledge that their voluntary settlement of $3,000,000 extinguishes any common-law and statutory contribution rights. *See Beech Aircraft Corp. v. Jinkins*, 739 S.W.2d 19 (Tex. 1987); *International Proteins Corp. v. Ralston-Purina Co.*, 744 S.W.2d 932 (Tex. 1988); TEX. CIV. PRAC. & REM. CODE ANN. § 33.015(d)(Vernon 1993). However, appellants argue they have a right to "contractual contribution" for appellees' proportionate share of fault based upon the indemnification clause contained in the "Asset Purchase Agreement," signed by appellants and Emscor on January 24, 1987, when Emscor sold the crane fleet to appellants. The pertinent portion of the "Asset Purchase Agreement" states:

> Indemnifications
>
> Indemnification by Sellers. Sellers [Emscor], jointly and severally, hereby indemnify and hold harmless the Purchaser [appellants] and its respective successors and assigns from and against any loss, damage, or expense (including reasonable attorneys' fees) caused by or arising out of:
>
> (i) any breach or default in the performance by Sellers of any covenant or agreement of Sellers contained in this Agreement;
>
> (ii) any breach of warranty or inaccurate or erroneous representation made by Sellers herein, in any Exhibit hereto, or in any certificate or other instrument delivered by or on behalf of Sellers pursuant hereto;

(iii) third party claims regarding Emscor's' management of Purchaser's Wolff tower cranes prior to the closing Date;

(iv) third party claims regarding any matter relating to title to or Emscor's maintenance of the Purchase Assets prior to the Closing Date; or

(v) any liability arising out of any and all actions, suits, proceedings, claims. demands, judgments, costs, and expenses (including reasonable legal and accounting fees) incident to any of the foregoing.

The express negligence rule requires parties seeking to indemnify the indemnitee from the consequences of its own negligence to express that intent in specific terms. Under the test, the intent of the parties must be specifically stated within the four corners of the contract before such indemnity provision is enforceable. *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987). Application of the express negligence test is proper at the summary judgment stage; fault apportionment is not a prerequisite to judging an indemnity agreement's effectiveness. *Atlantic Richfield v. Petroleum Personnel*, 768 S.W.2d 724 (Tex. 1989). Appellants argue the trial court's application of the express negligence rule was improper because appellants were seeking reimbursement not for their own negligence, but for appellees' negligence.

We agree with appellants that the express negligence rule does not apply in this case because appellants are not seeking to recover for their own negligence. We also agree with appellants that if they were seeking to recover for their own negligence, they would be barred by the express

negligence rule because the indemnification clause does not meet the requirements set forth in *Ethyl Corp.*, 725 S.W.2d 705.

However, we also find that the indemnification agreement is not effective in establishing a claim for contractual contribution. The clause is an indemnity provision, not a contractual contribution provision. There is no agreement that appellees will reimburse appellants for any voluntarily settlements made with any plaintiffs. The contract provision does not mention "contribution," and fails to discuss any apportionment of fault. The contract provision also fails to set forth any intent by the parties for a claim for reimbursement. The indemnification agreement does not provide for contractual contribution. Therefore, the indemnification clause is not necessary because appellants are not seeking reimbursement for their own negligence and if they were, are barred by the express negligence rule, and the clause is ineffective in establishing a contractual contribution for a voluntary settlement. Appellants voluntarily paid $3,000,000 to plaintiffs in the underlying case. By doing so appellants have destroyed any forum for determining who was at fault. Appellants are not entitled to reimbursement for their voluntarily settlement of $3,000,000. We overrule appellants' first, second and third points of error.

In its cross-point, appellees argue the trial court erred in granting appellants' motion for summary judgment because the summary judgment evidence presented a genuine fact issue for the jury to decide if Emscor's negligence was the sole cause of the accident. We agree that there is a fact question as to the cause of the accident.

However, appellants' motion for summary judgment asserted that appellees were the sole cause of the accident and that there was no basis for appellees' assertion of a

contractual contribution and/or indemnity claim. In their response to appellants' motion for summary judgment, appellees furnished controverting evidence as to the cause of the accident. They did not furnish any evidence to support their assertion of a contractual contribution and/or indemnity claim. The summary judgment order does not state on which of the two grounds it was granted; therefore, if either ground is insufficiently controverted by the evidence, the summary judgment will be upheld. Appellees must show that each of the independent arguments alleged in the motion is insufficient to support the summary judgment. *See Tilotta v. Goodall*, 752 S.W.2d 160, 161 (Tex.App.--Houston[1st Dist.] 1988, writ denied).

In their pleadings, appellees rely upon the same contract appellants relied upon to establish a contractual contribution. The contract provided for reciprocal indemnity obligations. Based upon our discussion of appellants' three points of error, we find that appellees' reciprocal indemnity obligations fail to establish a right for contractual contribution. We overrule appellees' cross-point.

Accordingly, we affirm the judgment of the trial court.

/s/ Robert E. Morse, Jr.
Former Justice

Judgment rendered and Opinion filed July 1, 1993.

Panel consists of Justices Robertson, Cannon and Morse (sitting by designation).

Publish - Tex. R. App. P. 90.

APPENDIX C

BELL & MURPHY
ATTORNEYS AT LAW
1300 POST OAK BOULEVARD
20th FLOOR
HOUSTON, TEXAS 77056-3095
(713) 871-6700

EDWARD J. MURPHY FAX (713) 871-6767

September 3, 1993

Richard E. Windhorst, Jr.
Office of the Clerk
Fifth Circuit Court of Appeals
600 Camp Street
New Orleans, LA 70130

RE: Cause No. 93-2138; Hamilton vs. Amoco vs. Woodson Construction Co.; In the United States Court of Appeals for the Fifth Circuit
Our Ref.: 166-25

Dear Mr. Windhorst:

By letter of August 24, 1993, attorneys for appellee Woodson Construction Company sent the Court a letter attaching a very recent Texas appellate court opinion, Man GHH Logistics Gmbh v. Emscor, Inc., No. C14-92-01254-CV (Tex. App.--Houston [14th Dist.] July 1, 1993). For reasons stated in this letter, Amoco submits that the Man GHH case clearly supports Amoco's position on appeal rather than Woodson's position.

The operative facts of Man GHH case were similar to this case. A party that had settled a personal-injury claim, thus abandoning its statutory and common-law claims for contribution, sought a recovery of both indemnity and contribution based on the contract between the parties.

The appellate court in Man GHH denied any recovery. It defined indemnity as being a recovery for all losses, including losses caused by the negligence of the party seeking indemnity. (Slip op. at 4-5) The appellate court denied indemnity because the contract at issue did not meet the express-negligence test of Ethyl Corp. v. Daniel, 725 S.W.2d 705 (Tex. 1987). The appellate court defined contribution as being recovery only for that portion of the loss attributable to the negligence of the party that did not pay the settlement. (Slip op. at 5). The appellate court denied contribution on the basis that the contract between the parties did not contain any provision that could be interpreted as calling for contribution.

Under Man GHH, then, the dispositive issue is whether the contract requires the non-settling party to pay in proportion to that party's negligence. In this case, the contract between Woodson and Amoco does indeed require Woodson to pay in proportion to its negligence.

The critical provision in the Woodson-Amoco contract is the following:

> The Contractor (Woodson) shall indemnify and save Company (Amoco) harmless from and against any and all losses . . . caused by

> or resulting from the negligence of the Contractor . . . or from poor, improper or unworkmanlike performance. . . and the Contractor agrees to reimburse Company for all sums which Company may pay. . . in settlement of any claim on account thereof...

This provision is different from the provision at issue in the Man GHH case in every critical respect.

First, in Man GHH, the court said that "[t]here is no agreement that appellees will reimburse appellants for any voluntary settlements made with any plaintiffs." (Slip op. at 5). Here, by contrast, Woodson specifically "agrees to reimburse Company for all sums which Company may pay. . . in settlement of any claim."

Second, the Man GHH court said that "[t]he contract provision does not mention 'contribution,' and fails to discuss any apportionment of fault." (Slip op. at 5). Although the Woodson-Amoco contract may not use the word "contribution," it specifically states that Woodson is obligated to Amoco only to the extent of Woodson's "negligence," or its "poor, improper or unworkmanlike performance," which language unmistakably incorporates the concept of apportionment.

Third, the Man GHH court said that "[t]he contract provision also fails to set forth any intent by the parties for a claim for reimbursement." (Slip op. at 5). Here, by contrast, the Woodson-Amoco contract specifically does incorporate a provision for reimbursement, using that very word.

If those textual differences alone were not enough, the evidence of record also shows that the parties specifically contemplated that Woodson would reimburse Amoco in proportion to Woodson's fault. Louis Woodson, the president of Woodson Construction, testified that the Woodson-Amoco contract meant:

> We hold you (Amoco) harmless for things that we do at Woodson Construction Company but not what Amoco does or causes Woodson to do.

(R. 1073). Amoco plainly had the same understanding, as evidenced by the fact that it is not seeking to recover that portion of the loss arising out of its own negligence, but only for that portion of the loss arising out of Woodson's negligence.

In our case, of course, Woodson and Amoco have stipulated that each party was 50% at fault in the underlying casualty, and that Amoco's settlement payment of $6,025,000 was reasonable and necessary. Amoco submits that on the facts of our case, the Man GHH court would permit Amoco to recover 50% of the settlement amount, or $3,012,500, because the Woodson-Amoco contract contains all of the terms that the contract at issue in Man GHH lacked.

Richard E. Windhorst, Jr.
September 3, 1993
Page 5

Amoco appreciates the Court's consideration of its views concerning the Man GHH case.

Very truly your,

BELL & MURPHY

/s/ Edward J. Murphy
Edward J. Murphy
Gerard J. Kimmitt

Attorneys for Appellant
Amoco Production Company

JFW\alc
C:\apps\docs\jfw\166-25\a166-25.01

cc: Bradley M. Bingham, Esq.
Bingham & Mann
1001 Fannin, Suite 1212
Houston, Texas 77002

APPENDIX D

FILED
RAY HARDY DIST. CLERK
HARRIS COUNTY TEXAS
1987 NOV 19 PM 4:47
BY _____
DEPUTY

NO. 87-51143

ROBERT LEE HAMILTON and GWENDOLYN MARIE HAMILTON, Individually and as Next Friend of Minors, CLINTON HAMILTON and AMBER HAMILTON, and CHESTER HAMILTON and EVELYN HAMILTON	§	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
VS.	§	215TH JUDICIAL DISTRICT
AMOCO PIPELINE COMPANY	§	

NOTICE

TO: PLAINTIFF, ROBERT LEE HAMILTON, et al, et ux, by and through his attorney of record, Joseph D. Jamail, Esq., Jamail and Kolius, 3300 One Allen Center, Houston, Texas 77002

CLERK, U.S. DISTRICT COURT
RECEIVED
NOV 10 1987

You are hereby notified that on the 19th day of November, 1987, Amoco Pipeline Company, Defendant in the above-entitled and numbered cause, filed in the United States District Court for the Southern District of Texas, Galveston Division, its petition for removal and bond, copies of which are attached hereto, for the purposes of removing the above-entitled and numbered cause to the District Court of the United States for the Southern District of Texas, Galveston Division, and has filed with the district clerk of Harris County, Texas, a copy of said petition, thereby removing said cause.

Respectfully submitted,

CLANN, BELL & MURPHY

By: /s/ Edward J. Murphy
Edward J. Murphy
TBA #14697500
Gerard J. Kimmitt, II
TBA #11427500
20th Floor, Allied Bank Tower
1300 Post Oak Boulevard
Houston, Texas 77056
(713) 871-0333

ATTORNEYS FOR DEFENDANT
AMOCO PIPELINE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice was mailed certified mail, return receipt requested, to Joseph D. Jamail, Jamail & Kolius, 3300 One Allen Center, Houston, Texas, 77002, on this 19th day of November, 1987.

/s/ Vicky J. Davis
Vicky J. Davis

WW166.25

CLERK U S DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
NOV 19 1987
JESSE E. CLARK, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ROBERT LEE HAMILTON	§	
and GWENDOLYN MARIE	§	
HAMILTON, Individually	§	
and as Next Friend of	§	
Minors, CLINTON	§	
HAMILTON and AMBER	§	
HAMILTON, and CHESTER	§	
HAMILTON and EVELYN	§	
HAMILTON	§	
	§	C. A. NO.
VS.	§	G-87-405
	§	
AMOCO PIPELINE COMPANY	§	

BOND

KNOW ALL MEN BY THESE PRESENTS that Amoco Pipeline Company is held and firmly bound to Robert Lee Hamilton, et al, et ux, plaintiff in the above-entitled and numbered cause, his successors and assigns, in the sum of FIVE HUNDRED AND NO/00 DOLLARS ($500.00), for the payment of which well and truly to be made we send ourselves, our successors and assigns, jointly and severally, by these presents, upon condition nevertheless that

WHEREAS, the said plaintiff has brought suit of a civil nature in the 215th Judicial District of Harris County, Texas, No. 87-51143, against defendant; and

WHEREAS, defendant simultaneously with the filing hereof is filing its petition in United States District Court for the Southern District of Texas, Galveston Division, for the removal of such suit to the United States District Court for the Southern District of Texas, Galveston Division, and intends immediately thereafter to file its petition with the district clerk of Harris County, Texas, according to the provision of the Act of Congress in such cases made and provided,

NOW, THEREFORE, the condition of this obligation is such that if the said United States District Court should determine that such suit was wrongfully and improperly removed to said United States District Court, the said defendant shall well and truly pay all costs and disbursements incurred and to that end has deposited herewith the cash sum of FIVE HUNDRED AND NO/100 DOLLARS ($500.00), to which the clerk of this court is authorized irrevocably to pay to the plaintiff if so directed by the Court.

Executed this 19th day of November, 1987.

Respectfully submitted,

By: /s/ Edward J. Murphy

Edward J. Murphy
Admissions No. 5174
20th Floor, Allied Bank Tower
1300 Post Oak Boulevard
Houston, Texas 77056
(713) 871-0333

ATTORNEYS FOR DEFENDANT
AMOCO PRODUCTION COMPANY

OF COUNSEL:

CLANN, BELL & MURPHY
A Professional Corporation

Gerard J. Kimmitt, II
20th Floor, Allied Bank Tower
1300 Post Oak Boulevard
Houston, Texas 77056
(713) 871-0333

WW166.25

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Bond was mailed certified mail, return receipt requested, to Joseph D. Jamail, Jamail & Kolius, 3300 One Allen Center, Houston, Texas, 77002 on this 19th day of November, 1987.

/s/ Vicky J. Davis
Vicky J. Davis

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
NOV 19 1987
JESSE E. CLARK, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ROBERT LEE HAMILTON	§	
and GWENDOLYN MARIE	§	
HAMILTON, Individually	§	
and as Next Friend of	§	
Minors, CLINTON	§	
HAMILTON and AMBER	§	
HAMILTON, and CHESTER	§	
HAMILTON and EVELYN	§	
HAMILTON	§	
	§	C. A. NO.
VS.	§	G-87-405
	§	
AMOCO PIPELINE COMPANY	§	

PETITION FOR REMOVAL

COMES NOW Amoco Pipeline Company, hereinafter "Amoco", a defendant herein, and files this petition for removal of a suit enumerated Cause No. 87-51143 brought by Robert Lee Hamilton, et al, et ux, plaintiff, from the 215th Judicial District Court of Harris County, Texas, where the suit was instituted, to the United States District Court for the Southern District of Texas, Galveston Division, and, expressly reserving all questions other than that of removal, respectfully shows the Court the following:

I.

Amoco is the defendant in the civil action brought against it in the 215th Judicial District Court of Harris County, Texas; copies of the citation and petition are attached hereto and constitute all process, pleadings and orders served upon Amoco in said action.

II.

The aforesaid action was commenced by the service of process consisting of the citation upon Prentice-Hall Corporation System, Inc., Amoco's registered agent for service of process, on November 13, 1987.

III.

The above-described action is one of which this court has original jurisdiction under the provisions of 28 U.S.C.A. § 1332 (diversity), and is one which may be removed to this court by the petitioner/defendant herein pursuant to the provisions of 28 U.S.C.A. § 1441 in that it is a civil action wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs.

IV.

At the time of the service of the citation and petition, petitioner was, and now is, a corporation duly organized and existing under and by virtue of the laws of the state of Maine with its principal office and place of business in Illinois. At the time of the service of the summons and complaint in this action, the plaintiffs were and still are citizens of the state of Louisiana.

V.

Because complete diversity exists and none of the parties are citizens of the State of Texas, Amoco is incorporated in Maine and has its principal place of business in Illinois, plaintiffs are citizens and residents of Louisiana, this case is properly removable under 46 U.S.C. § 1441.

Amoco files and presents herewith a bo[illegible]with good and sufficient surety in the sum of FIVE HUNDRED AND NO/100 DOLLARS ($500.00) conditioned and required by the acts of Congress on that behalf duly made and provided, that petitioner will pay the costs and disbursements incurred by reason of this removal proceeding should it be determined that this case is not removable or is improperly removed.

WHEREFORE, PREMISES CONSIDERED, Amoco prays that this petition be accepted and the aforesaid bond approved by this Honorable Court as good and sufficient and that the aforesaid action now pending against it in the 215th Judicial District Court of Harris County, Texas, be removed therefrom to the United States District Court for the Southern District of Texas, Galveston Division, and that this case proceed in this court as a properly removed cause and that Amoco have such other, further, and different relief as to this court may seem just and proper in the premises.

Respectfully submitted,

By: /s/ Edward J. Murphy
Edward J. Murphy
Admissions No. 5174
20th Floor, Allied Bank Tower
1300 Post Oak Boulevard
Houston, Texas 77056
(713) 871-0333

ATTORNEYS FOR DEFENDANT
AMOCO PIPELINE COMPANY

OF COUNSEL:

CLANN, BELL & MURPHY
A Professional Corporation

Gerard J. Kimmitt, II
20th Floor, Allied Bank Tower
1300 Post Oak Boulevard
Houston, Texas 77056
(713) 871-0333

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Removal was mailed certified mail, return receipt requested to Joseph D. Jamail, Jamail & Kolius, 3300 One Allen Center, Houston, Texas, 77002 on this 19th day of November, 1987.

/s/ Vicky J. Davis
Vicky J. Davis

WW166.25

VERIFICATION

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

EDWARD J. MURPHY, being duly sworn, deposes and says:

I am a member of the firm of Clann, Bell & Murphy, a Professional Corporation, attorneys for Amoco Pipeline Company, Defendant herein, and I have read the foregoing Petition for Removal and know the contents thereof. The same is true to the best of my knowledge and belief except as to those matters therein alleged upon information and belief, and as to those matters, I believe them to be true. The sources of my information and the grounds of my belief, as to the matters herein alleged upon information and belief, are records and documents of the Amoco Pipeline Company available to me as one of their attorneys.

/s/ Edward J. Murphy
EDWARD J. MURPHY

SUBSCRIBED AND SWORN TO before me, the undersigned authority, this 19th day of November, 1987.

/s/ Vicky J. Davis
Notary Public in and for
the State of T E X A S

My Commission Expires:

Vicky J. Davis
Notary Public - State of Texas
My Commission Expires 6/4/89

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